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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1935

No. 774

CORINNE S. KOSHLAND,
Petitioner,

vs.

GUY T. HELVERING, Commissioner of Internal Revenue,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit.

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To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Petitioner Corinne S. Koshland prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Ninth Circuit entered in the above entitled cause on January 20, 1936.

OPINIONS BELOW.

The opinion of the Board of Tax Appeals (R. 25-32) is an unpublished Memorandum Opinion. The opinion of the Circuit Court of Appeals is reported in .....Fed. (2d)..... (R. 108-133.)

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on January 20, 1936. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

STATUTES INVOLVED.

The pertinent statutes involved will be found in the appendix, *infra*, page i.

QUESTION PRESENTED.

Where a dividend is declared upon cumulative non-voting preferred shares, payable in common voting shares, may the original cost of the preferred shares be reduced by apportioning such cost between the preferred and common shares for the purpose of determining gain or loss under the Revenue Act upon the sale or other disposition of the preferred shares?

STATEMENT OF THE CASE.

The facts as found by the Board of Tax Appeals in its Memorandum Opinion (R. 25-32) may be summarized as follows:

Petitioner acquired by purchase in 1924 and 1926 certain shares of preferred stock of Columbia Steel Corporation. The Articles of Incorporation of Columbia Steel Corporation provided that the holders of its preferred stock should receive annually as dividends thereon $7.00 per share in cash or, at the option of the corporation, one share of its common stock for each share of preferred stock. The Articles further provided that dividends on the preferred stock should be paid in full before any dividend should be paid or payable on the common stock. All voting rights pertained to the common stock, none to the preferred.

In each of the years 1925, 1926, 1927 and 1928 the corporation had a surplus sufficient to pay the preferred dividends in cash, but elected to pay them and did pay them in common stock, as authorized by its Articles. Petitioner received in those years shares of common stock as dividends on her preferred stock. In 1930 the corporation redeemed its preferred stock at $105.00 per share, pursuant to the provisions of the Articles. In computing the profit realized by petitioner, the Commissioner allocated to the common stock received, in each instance, a proportionate amount of the cost of the preferred stock upon which it was paid. This action of the Commissioner decreased the cost basis to petitioner of the preferred stock and increased the profit resulting from its redemption.

The Board of Tax Appeals disapproved the Commissioner's determination, holding that the proper cost basis of petitioner's preferred stock was the amount which she paid therefor.

The Circuit Court of Appeals reversed the decision of the Board of Tax Appeals and approved the Commissioner's determination.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that a dividend declared upon cumulative non-voting preferred shares, payable in common voting shares, constituted a non-taxable stock dividend.

2. In holding that, for income tax purposes, dividends in the form of common stock paid upon preferred stock, whether income or not, should be treated as merely constituting additional evidence of the preferred stockholder's capital investment and that, for the purpose of determining gain or loss on the disposition of the preferred shares, the original cost of the preferred shares should be apportioned between the preferred stock and the common stock received as dividends thereon, in proportion to their respective values.

3. In reversing the decision of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT.

I.

THE DECISION BELOW IS IN DIRECT CONFLICT WITH THE DECISION OF ANOTHER CIRCUIT COURT OF APPEALS ON THE SAME MATTER.

The decision below is in direct conflict with *Commissioner v. Tillotson Mfg. Co.*, 76 Fed. (2d) 189 (C. C. A. 6). Both the majority and dissenting opinions in the decision below recognize such fact. The majority opinion in referring to *Commissioner v. Tillotson Mfg. Co.*, states: "We do not agree with that holding." (R. 112.) The dissenting opinion points out that "the majority opinion in this case is in clear conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in Commissioner of Int. Rev. v. Tillotson Mfg. Co. * * *." (R. 128.)

The decision below in the Ninth Circuit and the decision in *Commissioner v. Tillotson Mfg. Co.* in the Sixth Circuit are the only adjudications of the Circuit Courts upon the question involved herein. The issue presented in the *Tillotson* case was identical with that herein, viz., whether upon the sale or other disposition of shares of cumulative non-voting preferred stock upon which the holder had received a dividend payable in voting common stock, the original cost of the preferred shares should be reduced, for income tax purposes, by apportioning such cost between the preferred and common shares.

II.

THE DECISION BELOW IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The decision below is inconsistent with the holdings of this Court in *Eisner v. Macomber,* 252 U. S. 189, *Weiss v. Stearn,* 265 U. S. 242, and *Marr v. United States,* 268 U. S. 536. In those cases this Court held that Congress under the Sixteenth Amendment cannot tax as income that which is not in fact income. In the *Eisner* case a dividend paid in stock was held not to be income and hence not taxable where the dividend is of such character that "the proportional interest of each shareholder remains the same" and the "only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of the new ones". In the *Weiss* case a dividend in the form of stock was held taxable as income where the stockholder receives "a thing really different from what he heretofore had". In the *Marr* case this Court declared, in respect of a distribution claimed by the taxpayer to be a tax free stock dividend, that "the additional value of the new securities * * * is income", where "the stockholders no longer owned merely the same proportional interest of the same character in the same corporation". The majority opinion in the Court below held that it is immaterial whether the common stock received by petitioner as dividends on her preferred stock constituted income at time of receipt; that "such dividends, whether income or not, should be treated

as merely constituting additional evidence of the stockholder's capital investment"; and that for the purpose of determining gain or loss upon the sale of the preferred shares, the cost thereof should be reduced by reason of the receipt of the dividend in common shares. (R. 114.) As pointed out in the dissenting opinion in the Court below, the "majority opinion's interpretation would have Congress attempting to tax *capital* by the device of deducting from capital cost *income* produced from capital in determining the gain on the sale of the stock representing the original investment". (R. 117-118.) In thus holding that *capital* may be taxed as income, the decision of the Court below is in direct conflict with the principle enunciated by this Court in *Eisner v. Macomber, Weiss v. Stearn* and *Marr v. United States,* supra.

III.

THE CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW.

The question presented is important, because (a) of the recognized frequency of dividends of the character here involved; (b) of the large number of cases now pending before the Board of Tax Appeals presenting the identical issue; (c) the applicable provisions of the Revenue Acts of 1926 and 1928 involved herein have been carried forward, unchanged, into the Revenue Acts of 1932 and 1934.

Wherefore, it is respectfully submitted that this petition should be granted.

Dated, San Francisco, California,
February 17, 1936.

JOHN C. ALTMAN,
Attorney for Petitioner.

(Appendix Follows.)